

A **FREESCALE SEMICONDUCTOR MALAYSIA SDN BHD**

v.

EDWIN MICHAEL JALLEH & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
CLEMENT ALLAN SKINNER JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: W-01-160-2010]
C 5 JUNE 2013

***LABOUR LAW:** Employment - Dismissal - Misconduct - Sexual harassment - Magnitude of misconduct - Whether first respondent took advantage of subordinate - Industrial Court awarded compensation in lieu of reinstatement - Whether Industrial Court exercised jurisdiction fairly - Whether compensation in lieu of reinstatement imposed punishment upon company*

***LABOUR LAW:** Industrial Court - Decision - Sexual harassment in workplace - Whether court exercised jurisdiction fairly - Whether relevant matters considered - Award of - Whether compensation in lieu of reinstatement warranted - Whether award imposed punishment upon company*

F The first respondent was a senior manufacturing supervisor in the appellant's company and his employment was terminated due to a certain act of sexual harassment committed by him against the appellant's employees which amounted to a serious misconduct. The Industrial Court held that the first respondent's dismissal was without just cause or excuse and ordered that the first respondent
G be accorded with backwages and compensation *in lieu* of reinstatement. Subsequently, the High Court dismissed the appellant's application for judicial review to quash the award of the Industrial Court. Dissatisfied, the appellant appealed to this court.

H **Held (allowing appeal)**
Per Abdul Wahab Patail JCA delivering the judgment of the court:

I (1) The germane consideration in industrial relations is that the remedy imposed is warranted and not disproportionate to the misconduct committed. Consideration must be taken not only

- of matters concerning the interests of the party who committed the misconduct, but also the whole of the circumstances in the interests of maintenance of good industrial relations in the workplace. (para 15) A
- (2) Although the Industrial Court was not wrong in considering the matters that it did, it failed to take other equally relevant matters into consideration. The misconduct in this case is a misconduct committed by a peer in the workplace. Being a superior, it increased the magnitude of the misconduct, as it invited the implication that the first respondent was taking advantage of his subordinate who might be afraid to complain. Besides, the misconduct was committed in a place where a saw machine was used, which suggested a certain disregard for safety. (para 16) B C
- (3) The misconduct was not of any inadvertent or accidental physical contact, but wilful although it was committed in full view of other employees and the victim was fully attired and protected by her work clothes. In a multicultural work environment, industrial harmony is achieved, not by one acting on the norms acceptable to himself, but he must be sensitive to what is acceptable by others. The Industrial Court had therefore failed to exercise its jurisdiction fairly or justly and warranted the exercise of the supervisory jurisdiction of judicial review. (paras 16 & 17) D E F
- (4) The remedy was that the misconduct does not occur again. The fact that there was no evidence of apology but only the defence of denial implied lack of contriteness. In the circumstances, reinstatement could not be considered, as it would put the first respondent into the same position and it would have implied that he committed no act of misconduct. An award *in lieu* of reinstatement imposed a punishment upon the appellant for seeking to remedy misconduct in the workplace, when the misconduct was not the act of or contributed by the appellant, but solely the personal act of the first respondent. (para 18) G H

Bahasa Malaysia Translation Of Headnotes

Responden pertama merupakan penyelia kanan pengeluaran di syarikat perayu dan perkhidmatannya telah ditamatkan akibat perbuatan gangguan seksual terhadap pekerja-pekerja perayu yang membentuk satu salah laku serius. Mahkamah Perusahaan I

- A memutuskan bahawa pemberhentian responden pertama adalah tanpa alasan yang adil dan memerintahkan agar responden pertama diberikan gaji tertunggak dan pampasan sebagai ganti pelantikan semula. Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman bagi membatalkan award Mahkamah
- B Perusahaan. Tidak berpuas hati, perayu merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

- C (1) Pertimbangan dalam perhubungan perusahaan adalah bahawa remedi yang dibenarkan adalah wajar dan seimbang dengan salah laku yang dilakukan. Pertimbangan perlu dibuat bukan sahaja terhadap perkara yang berkaitan dengan kepentingan pihak yang telah melakukan salah laku tetapi juga terhadap keseluruhan keadaan demi menjaga perhubungan perusahaan yang baik di tempat kerja.
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- E (2) Walaupun Mahkamah Perusahaan tidak khilaf dalam mengambilkira perkara-perkara yang dipertimbangkan olehnya, ia gagal mempertimbangkan perkara-perkara penting yang lain. Salah laku dalam kes ini dilakukan oleh rakan sekerja di tempat kerja. Sebagai seorang pegawai atasan, ia meningkatkan magnitud salah laku kerana ia mengundang implikasi bahawa responden pertama telah mengambil kesempatan terhadap pegawai bawahannya yang mungkin berasa takut untuk mengadu. Tambahan lagi, salah laku berlaku di tempat mesin
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- gergaji digunakan yang mencadangkan keabaian terhadap keselamatan.
- G (3) Salah laku tersebut tidak berlaku tanpa sengaja atau sentuhan fizikal secara tidak sengaja, tetapi disengajakan walaupun ia dilakukan di hadapan pekerja-pekerja lain dan mangsa berpakaian penuh dan dilindungi dengan pakaian kerjanya. Dalam persekitaran kerja pelbagai budaya, keharmonian industri
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- dicapai bukan mengikut norma yang dipercayai oleh seseorang, tetapi dia juga mestilah sensitif terhadap apa yang diterima oleh orang lain. Mahkamah Perusahaan, oleh itu, telah gagal melaksanakan bidang kuasanya dengan adil dan mewajarkan pelaksanaan bidang kuasa pengawasan semakan kehakiman.
- I (4) Remedi yang wajar adalah bahawa salah laku tersebut tidak berulang lagi. Fakta bahawa tidak ada keterangan permohonan maaf tetapi hanya pembelaan penafian menunjukkan tiadanya

penyesalan. Dalam keadaan tersebut, pelantikan semula tidak boleh dipertimbangkan kerana ia akan meletakkan responden pertama dalam kedudukan yang sama dan akan mempunyai makna tersirat bahawa dia tidak melakukan sebarang perbuatan salah laku tersebut. Award sebagai ganti pelantikan semula bermaksud menghukum perayu yang memohon remedi terhadap salah laku di tempat kerja, sedangkan salah laku tersebut bukanlah perbuatan atau sumbangan perayu, tetapi perbuatan responden pertama semata-mata.

Case(s) referred to:

- Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297 CA (**refd**)
- Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 FC (**refd**)
- Mohd Zaihan Mohd Zain v. Island & Peninsular Bhd* [2008] 4 ILR 155 (**refd**)
- Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 FC (**refd**)
- Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor* [2000] 6 CLJ 521 HC (**refd**)

Legislation referred to:

- Industrial Relations Act 1967, s. 20
- Rules of the High Court 1980, O. 53
- For the appellant - N Sivabalah (E Reena with him); M/s Shearn Delamore & Co*
- For the respondents - Cedric Nigel Miranda (Sri Dev Nair with him); M/s Cedric Miranda & Co*
- [*Appeal from High Court, Kuala Lumpur; Judicial Review No: R4(R2)-25-15-09*]
- Reported by Kumitha Abd Majid*

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Freescale Semiconductor Malaysia Sdn Bhd appealed against the decision of the High Court which upheld Industrial Court Award No: 2160-2008 dated 24 December 2008. At the end of the hearing the appeal was allowed, the order of the High Court and award of the Industrial Court were set aside.

A Background

[2] The first respondent Edwin Michael Jalleh (hereafter “the respondent”) was a senior manufacturing supervisor. On 8 March 2005, he was given notice to show cause on allegations of misconduct on his part as follows:

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- (1) On 6 March 2005, had deliberately touched/pat Intan Nurulain, bdg No: 28529 at her buttock while she was working at the saw machine. She screamed at the instance when she realized what you did;

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- (2) Sometime last year, while you were in the lift together with employee Musliha, bdg No: 22366 and Yusnita bdg No: 24997, you deliberately tried to touch/pat her buttock and when asked by her why did you do that you answered that you wanted to know what was inside her pocket.

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The above actions are amounting (sic) to sexual harassment committed to co-workers/employees and considered as a very serious misconduct in our organisation.

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[3] By letter 18 March 2005, the respondent denied the allegations.

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[4] The respondent was informed that his explanation was held to be unsatisfactory and a domestic inquiry was scheduled for 30 March 2005. The proceedings were held on 30 March 2005 and 31 March 2005. The domestic inquiry dismissed the second allegation but found the first allegation to be proved. A letter of dismissal was issued on 6 April 2005 that his employment was terminated with effect from 6 April 2005.

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[5] The respondent filed a claim under s. 20 of the Industrial Relations Act 1967 that his services had been terminated without just cause or excuse. He sought *inter alia*, reinstatement.

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[6] The matter was referred to the Industrial Court, which concluded that the respondent’s dismissal was without just cause or excuse and ordered that the respondent be accorded with backwages and compensation *in lieu* of reinstatement amounting to RM248,768.

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[7] Examination of the award shows that the Industrial Court found as follows:

... The Court believed COW2 and COW3 that the Claimant had slapped COW2 on her buttocks. The Claimant was a man who was very much older than COW2 who was a young female. The

very act of the Claimant slapping the buttocks of COW2 was an act of sexual harassment. The buttocks is a sensitive and private part of the anatomy. It was a grave and serious misconduct. The Court did not believe the claimant that COW6 had plotted and instigated COW2 to make a false allegation against him.

A

[8] Notwithstanding that finding, the Industrial Court found the punishment of dismissal to be too harsh, reasoning that:

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In deciding whether the punishment was appropriate or too harsh, the court took into consideration the gravity of the offence, the events leading to that act and the circumstances of the incident such as the place of the misconduct and the amount of physical contact between the claimant and the victim. Although the victim and her female colleagues had laughed at the claimant, there was no provocation as the claimant was not angry with them.

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The incident happened in full view of the colleagues of the claimant and the victim. It was an open area on the factory floor and there were a number of factory operators working at their respective work stations. The Claimant and the victim were attired in smocks which were of knee length, masks with only the eyes exposed and caps. The victim's flesh was not violated by the claimant as it was protected by layers of cloth. The entire act of slapping the victim on her buttocks would have taken a few seconds. It was not a prolonged act. The victim had reacted in defence by screaming and scolding the claimant. There was no further danger to her as she was surrounded by her colleagues.

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The court also took into consideration the character evidence given by CLW3 who was the Claimant's subordinate; CLW4 who was his colleague and CLW5 who was a pastor of a church.

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The court found that the punishment of dismissal was too harsh in the circumstances. The court held that the dismissal was without just cause or excuse.

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[9] The High Court dismissed the application by the appellant herein for judicial review to quash the award of the Industrial Court. The High Court did not err in holding that "Whilst it is not disputed that sexual harassment is a serious misconduct, dismissal is not the only suitable and appropriate punishment." Accordingly, the High Court proceeded:

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The (Industrial) Court in determining whether the punishment of dismissal was too harsh is perfectly entitled to take into account, as it had done above, the circumstances in which the incident took place and the character evidence of the First Respondent.

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- A [10] We remind ourselves that although this is an appeal from a decision of the High Court, it arose from an application for exercise of its supervisory jurisdiction under O. 53 of the Rules of the High Court 1980.
- B [11] The matters the Industrial Court had taken into account, referring to the respondent who was the applicant in the Industrial Court, were as follows:
- C (a) The incident happened in full view of the colleagues of the applicant and the victim. It was an open area on the factory floor and there were a number of factory operators working at their respective work stations.
- D (b) The applicant and the victim were fully attired in smocks which were of knee-length, masks with only the eyes exposed and caps.
- E (c) The victim's flesh was not violated by the applicant as it was protected by layers of cloth.
- F (d) The entire act of slapping the victim on her buttocks would have taken a few seconds. It was not a prolonged act.
- G (e) The victim had reacted in defence by screaming and scolding the applicant.
- F (f) There was no further danger to her as she was surrounded by her colleagues.
- G (g) The character evidence given by CLW3 who was the applicant's subordinate; CLW4 his colleague and CLW5 who was a pastor of a church.
- H [12] Quite properly the High Court followed the Federal Court in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537 FC that the functions of the Industrial Court are two fold, (a) to determine whether the misconduct complained of by the employer has been established; and (b) whether the proven misconduct constituted just cause or excuse for the dismissal.
- I [13] The error, in our view, however was going beyond the concept of just cause or excuse for the dismissal and to consider dismissal as punishment, thereby leading, as it did in *Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor* [2000] 6 CLJ 521, to the discussion of an enlightened approach to punishment,

that punishment is imposed not in order to seek retribution or to give vent to feeling of wrath, that its main purpose of a punishment is to correct the fault of the employee concerned, that it is not expedient in the interest of the administration to visit every employee against whom a fault is established with the penalty of dismissal and to get rid of them, that the penalty imposed is commensurate with the magnitude of the fault.

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[14] Without digressing to the merits and purpose of punishment, the trite law is that to justify dismissal of an employee there has to be established such a misconduct that was serious enough to justify the remedy of a dismissal: see *Mohd Zaihan Mohd Zain v. Island & Peninsular Berhad* [2008] 4 ILR 155, although even in that case looking at the misconduct as an “offence” led to a holding that “The company is expected to consider any extraneous matters such as length of service and previous good conduct which may act in mitigation of the offence”. That such factors are described as “extraneous matters” indicates they are not the considerations that would necessarily drive the decision.

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[15] With respect, in our view, the germane consideration in industrial relations is that the remedy imposed is warranted and not disproportionate to the misconduct committed. Consideration must be taken not only of matters concerning the interests of the party who committed the misconduct, but also the whole of the circumstances in the interests of maintenance of good industrial relations in the workplace.

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[16] In our view, although the Industrial Court was not wrong in taking into consideration the matters that it did, it failed to take other equally relevant matters into consideration. The misconduct in this case is misconduct committed by a peer in the workplace. That the misconduct was committed by a superior, for the respondent was the senior manufacturing supervisor, increases the magnitude of the misconduct, as it invites the implication he was taking advantage of his subordinate who might be afraid to complain. That the misconduct was committed in a place where a saw machine is used suggests a certain disregard for safety. That it was committed in full view of other employees does not make it any less objectionable. It merely excludes suspicions of worse things. Likewise, that fact that the victim was fully attired and protected by her work clothes. The misconduct was not of any inadvertent or accidental physical contact, but wilful. One must expect in a multicultural society such as in this country, that the

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A workplace is also multicultural. In such multicultural work environment, industrial harmony, one of if not the main object(s) of industrial relations, is achieved not by one acting on the norms acceptable to himself, but he must be sensitive to what is acceptable by others.

B [17] The foregoing from para. 13 is not an elaboration of our
C consideration of the matters as an appeal, but to illustrate how
D those matters if taken into consideration could have affected the
determination of the award, and thereby demonstrate that the
matters ought to have been considered. It would be a different
matter if the Industrial Court took those matters into
consideration but dismissed them. But in this case, these matters
were not taken into consideration at all. In so failing, quite clearly
the Industrial Court had failed to exercise its jurisdiction fairly or
justly and warranted the exercise of the supervisory jurisdiction of
judicial review.

E [18] Further, the required remedy is that the misconduct does
F not occur again. There is no effort to apologise. There is no
evidence of any such apology and that such apology was accepted
by those in the workplace. Instead, the respondent's defence was
of denial. It implies a lack of contriteness. Quite correctly
reinstatement could not be considered as it would put the
respondent into the same position. It would have implied he
committed no misconduct. But an award *in lieu* of reinstatement
imposes a punishment upon the appellant for seeking to remedy
misconduct in the workplace, when the misconduct is not the act
of or contributed to by the appellant, but solely the personal act
of the respondent. Quite plainly the order falls into the irrationality
test adopted by the Federal Court in *Pihak Berkuasa Negeri Sabah*
G *v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105;
[2002] 3 MLJ 72 FC, followed by this court in *Dato' Seri Syed*
Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum
(Malaysia) [2012] 9 CLJ 297; [2012] 6 MLJ 340, and warrants
H the exercise of the same supervisory jurisdiction.

I [19] Accordingly, we set aside the order of the High Court and
the award of the Industrial Court.
